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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-736

WASHINGTON RESEARCH PROJECT, INC.,
Petitioner,

v.

DEPARTMENT OF
HEALTH, EDUCATION AND WELFARE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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INDEX

	Page
OPINION BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTE INVOLVED	3
STATEMENT	3
A. The NIMH Grant Review Process	3
B. The Present Case	6
REASONS FOR GRANTING THE WRIT	8
I. The Court of Appeals drastically curtailed the Act's requirement that all agency opinions and orders must be disclosed to the public	8
II. The Court of Appeals misapplied this Court's decision in *Environmental Protection Agency v. Mink*	12
CONCLUSION	16
APPENDIX A Opinion of the Court of Appeals for the District of Columbia	
APPENDIX B Memorandum opinion of the District Court for the District of Columbia	
APPENDIX C Statutory provisions involved	

TABLE OF AUTHORITIES

Cases:	Page
American Mail Line, Ltd. v. Gulick, 411 F.2d 696 (D.C. Cir. 1969)	10
Environmental Protection Agency v. Mink, 410 U.S. 73 (1973)	8, 12, 13, 15
Grumman Aircraft Engineering Corp. v. Renegotiation Board, 482 F.2d 710 (D.C. Cir. 1973)	11
National Labor Relations Board v. Sears, Roebuck and Company, No. 73-1233	11
Owens v. U.S. Bureau of Prisons, 379 F. Supp. 547 (D.D.C. 1974)	13
Renegotiation Board v. Bannercraft Clothing Co., 415 U.S. 1 (1974)	8
Renegotiation Board v. Grumman Aircraft Engineering Corp., No. 73-1316	8, 11, 12
Tennessean Newspapers, Inc. v. F.H.A., 464 F.2d 657 (6th Cir. 1972)	13
Vaughn v. Rosen, Civ. No. 1753-72 (D.D.C., October 9, 1974)	13
Wu v. National Endowment for Humanities, 460 F.2d 1030 (5th Cir. 1972)	13

Statutes: Page

ADMINISTRATIVE PROCEDURE ACT:
5 U.S.C. §551(6) 9
5 U.S.C. §551(7) 9

FREEDOM OF INFORMATION ACT:
5 U.S.C. §552 . . . . . 3, 8
5 U.S.C. §552(a)(2)(A) 2, 7, 9
5 U.S.C. §552(a)(3) 12
5 U.S.C. §552(b)(5) 2, 7, 12

PUBLIC HEALTH SERVICE ACT:
42 U.S.C. §217a 4
42 U.S.C. §218(a) 5
42 U.S.C. §218(c) 5
42 U.S.C. §242a(a)(2) 3
Pub. L. 93-352 §110 4

REGULATIONS:
42 C.F.R. §52.13 3
39 Fed. Reg. 1957 (1-11-74) 3

OTHER AUTHORITIES:
Department of Health, Education and Welfare, *Final Report of the Tuskeegee Syphilis Study Ad Hoc Panel* (1973) 14

Hearings on the Quality of Health Care - Human Experimentation, 1973 before the Subcommittee on Health of the Senate Committee on Labor and Public Welfare, 93d Cong., 1st Sess. (1973) . . . 14

H. Rep. No. 1497, 89th Cong., 2d Sess. (1966) 9, 15

Page

Office of Management and Budget, *The National Institutes of Health and National Institute of Mental Health Peer Review System* (1972). 14

S. Rep. No. 813, 89th Cong., 1st Sess. (1965) 15

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DEPARTMENT OF
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Washington Research Project, Inc. petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINION BELOW

The opinion and order of the Court of Appeals is unreported and is reproduced in Appendix A. The memorandum opinion of the District Court is reported at 366 F. Supp. 929 and is reproduced in Appendix B.

JURISDICTION

The judgment of the Court of Appeals was entered on September 12, 1974. Petitioner's petition for rehearing to clarify footnote 15 of the Court's opinion was denied on November 18, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether summary statements containing professional evaluations of proposed research projects which constitute the reasons for an agency's decision to fund such projects must be made available to the public under the Freedom of Information Act as final opinions or orders of that agency. 5 U.S.C. §552(a)(2)(A).

2. Whether, assuming they are not final opinions or orders, the evaluations must still be disclosed because they are not intra-agency memorandums or letters covered by exemption 5 of the Act. 5 U.S.C. §552(b)(5).

STATUTE INVOLVED

The relevant provisions of the Freedom of Information Act, as amended, 5 U.S.C. §552, are set out in Appendix C.*

STATEMENT

A. The NIMH Grant Review Process.[1]

Section 303(a)(2) of the Public Health Service Act, 42 U.S.C. §242a(a)(2), authorizes the Secretary of Health, Education and Welfare to make grants for "the development of improved methods of diagnosing mental illness, and of care, treatment, and rehabilitation of the mentally ill. . ." Authority to make such grants has been delegated by the Secretary to the Director of the National Institute of Mental Health (NIMH). *See* 39 Fed. Reg. 1957 (January 11, 1974).

To evaluate applications for research assistance under this authority, the Department of Health, Education and Welfare (HEW) has established a two-tier system of scientific "peer review". 42 C.F.R. §52.13. The first tier consists of initial review group (IRGs) made up of 10-20

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* These provisions are not materially affected by the Freedom of Information Act Amendments of 1974, Pub. L. 93-502, which will become effective February 19, 1975.

[1] The facts are not in dispute and are set forth in more detail in the opinion of the District Court. (App. B, pp. 3-8.)).

nongovernmental technical consultants.[2] IRGs meet three times a year to evaluate individual grant applications in depth. Review is based on the grant application, which is submitted four to six weeks in advance of the meeting to each member of the IRG, and a written report prepared by several members who have been delegated responsibility for the application and who, in many cases, have conducted an on-site review of the project facilities. A formal vote is taken on each project, and a rating is assigned to each approved project, for purposes of determining funding priorities.[3]

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[2] Within NIMH there are approximately twenty IRGs covering each of the major areas for which mental health research is conducted, as well as review groups for long-term program grants, small grants, fellowships and training. Until recently, the only statutory authority for the IRGs was found at 42 U.S.C. §217a, which authorizes the Secretary to "appoint such advisory committees . . . for such periods of time, as he deems desirable for the purpose of advising him in connection with any of his functions." In 1974, Congress explicitly directed the Secretary "to require appropriate scientific peer review" of biomedical and behavioral research grant applications. Pub. L. 93-352, §110.

[3] The minutes of each meeting, which are public, contain a complete attendance list and data on the number of approvals, disapprovals and deferrals of applications considered; they do not contain any information concerning individual applications.

After the IRG meeting, an NIMH staff person prepares a summary statement for each grant. The summary statement consists of (a) a one-word recommendation whether the project should be approved or disapproved; (b) a short description of the proposed project; (c) a "resume" which summarizes in two or three sentences the principal reasons for the IRG's recommendation; and (d) a technical "critique". The critique is the most detailed section of the statement. It evaluates the strengths and weaknesses of the project's aims, procedures, facilities and personnel. It also discusses the proposed project in light of other existing research in the field and the state of the art generally. Where human subjects are involved, the statements should include the opinion of the IRG on the risks involved. Finally, if a site visit report has been written, it is incorporated by reference into the summary statement.

The second stage in the dual NIMH review process involves the National Advisory Mental Health Council (NAMHC).[4] The NAMHC is authorized "to review research projects or programs submitted to or initiated by it in the field of mental health and recommend to the [Secretary] . . . any such projects which it believes show promise of making valuable contributions to human knowledge with respect to the cause, prevention, or methods of diagnosis and treatment of psychiatric disorders." 42 U.S.C. §218(c).

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[4] The NAMHC is set up by statute to "advise, consult with, and make recommendations to, the [Secretary] on matters relating to the activities and functions of the [Public Health] Service in the field of Mental Health." 42 U.S.C. §218(c). The members are the Assistant Secretary for Health, the Chief Medical Officer of the Veterans' Administration, a medical officer designated by the Secretary of Defense, and twelve public members appointed by the Secretary of HEW. 42 U.S.C. §218(a).

The NAMHC meets three times a year for two or three days to review the "recommendations" of all of the IRGs within NIMH. The NAMHC reviews from 500 to 1000 grants during each meeting. Except for grants on which a special question is raised (no more than 5% of the grants), the NAMHC approves the recommendations from each IRG in a block. Both the Court of Appeals and the District Court found that the NAMHC's concern is with overall policy direction and emphasis, and not with the merit of any individual application.

Following approval by the NAMHC, funding of a project is contingent upon the availability of funds. General priorities for funding are determined by the Director of NIMH, with the advice of the NAMHC. Within these general priorities, 90% of the approved grants are funded in the order of numerical priority set by the IRG. Researchers are notified of the grant award by an award letter which states that the project has been approved by the IRG and the NAMHC.

B. The Present Case.

The present case involves petitioner's request for records pertaining to eleven NIMH funded research projects which involve the testing of stimulant or anti-depressant drugs on school-age and/or preschool children.[5] The records

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[5] Petitioner is a public interest organization which specializes in the rights and needs of children. The eleven research projects in issue here were identified in the course of its investigations into the extent of federal support for behavior modification programs which utilize drugs on children and the federal requirements to protect children who are the subjects of federally funded medical experimentation. Petitioner conducts no medical or other scientific research of its own.

sought by petitioner include (1) the original grant applications for the eleven research projects, (2) any applications for the continuation, renewal or supplementation of those projects, which had been approved or were pending before the agency, and (3) the summary statements and site visit reports prepared during the review of the eleven grants by the appropriate IRG.

After reviewing a representative sample of the documents in issue,[6] the District Court (Gesell, J.) ruled that the records sought by petitioner are subject to mandatory disclosure under the Freedom of Information Act. The Court of Appeals, however, reversed the District Court's judgment regarding the summary statements and site visit reports.[7] First, the Court ruled that the summary statements are not final opinions and orders of an agency which must be disclosed to the public under §552(a)(2)(A) of the Act. (App. A. pp. 10-17.) Second, the Court ruled that the summary statements and site visit reports are exempt from mandatory disclosure under the Act's fifth exemption, 5 U.S.C. §552(b)(5), because they are "evaluative, and call into play the policy of protecting the deliberative process at which Exemption 5 is directed." (App. A, p. 20.)

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[6] Defendants submitted for *in camera* inspection one of the original grant applications and the summary statement and site visit report prepared for that application. Counsel for both parties agreed that these documents would be treated as representative of all of the documents withheld. The documents reviewed by the District Court *in camera* were part of the record before the Court of Appeals under seal.

[7] The Court of Appeals affirmed the District Court's judgment ordering disclosure of the grant applications.

REASONS FOR GRANTING THE WRIT

This case presents two important questions which will in large measure determine the extent to which the Freedom of Information Act, 5 U.S.C. §552, requires administrative agencies to disclose the facts and reasons underlying government decisions. The first question is whether an agency may refuse to disclose documents which contain the actual reasons for its decisions merely because those documents were prepared intitially by agency staff or consultants and not the nominal decision-makers themselves. This question has been deemed worthy of review by this Court in *Renegotiation Board v. Grumman Aircraft Engineering Corp.*, No. 73-1316, which will be heard this Term. However, *Grumman*, unlike the instant case, presents the issue in a particular factual context which may not permit a decison on the basic principle at stake. The second question is whether professional evaluations relied upon by an agency are intra-agency opinions protected from disclosure by exemption 5 of the Act. This question presents an unsettled and important issue regarding the meaning of this Court's opinion in *Environmental Protection Agency v. Mink*, 410 U.S. 73 (1973).

I. THE COURT OF APPEALS DRASTICALLY CURTAILED THE ACT'S REQUIREMENT THAT ALL AGENCY OPINIONS AND ORDERS MUST BE DISCLOSED TO THE PUBLIC.

The "ultimate purpose" of the Freedom of Information Act is "to enable the public to have sufficient information in order to be able, through the electoral process, to make intelligent, informed choices with respect to the nature, scope, and procedure of federal governmental activities." *Renegotiation Board v. Bannercraft Clothing Co.*, 415 U.S.

1, 17 (1974), quoting, *Frankel v. SEC*, 460 F.2d 813, 816 (2d Cir. 1972), *cert. denied*, 409 U.S. 889 (1972). To this end, the Act requires all federal agencies to make available for public inspection and copying "all final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases." 5 U.S.C. §552(a)(2)(A). The language of this section is extremely broad[8] and is demonstrative of a Congressional purpose to require disclosure of the secret law "embodied in thousands of orders, opinions, statements, and instructions issued by hundreds of agencies." H. Rep. No. 1497, 89th Cong., 2d Sess. 7 (1966).

The IRG summary statements at issue in this case constitute NIMH's "opinion" concerning the suitability of individual research proposals submitted to it for funding. Both the Court of Appeals (App. A, p. 6) and the District Court (App. B, p. 8) found that the NAMHC does not evaluate individual applications. Indeed, the IRGs were established precisely because the NAMHC does not have the time or expertise to review each application. (App. A, p. 12.)

The Court of Appeals recognized the "perfunctory" nature of NAMHC review. But it regarded it as "beside the point" (App. A, pp. 15-16), because of the NAMHC's statutory authority to review grant applications. In allowing the NAMHC's nominal authority to override the plain

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[8] The Administrative Procedure Act defines an adjudication as "any process for the formulation of an order," 5 U.S.C. §551(7); and an order is "the whole or any part of the final disposition . . . of any matter other than rulemaking but including licensing," 5 U.S.C. §551(6). An opinion is, of course, an explanation of, or justification for, an order.

fact that it is the IRG which decides whether individual applications are suitable for funding, the Court of Appeals adopted an arbitrary rule which exalts form over substance and ignores the realities of modern agency administration. The Court's decision would limit disclosure of the underlying reasons for governmental decisions to those few instances in which the head of the agency articulates the reasons for a decision or, possibly, those in which he explicitly acknowledges his adoption of a lower level "recommendation". See *e.g., American Mail Line, Ltd. v. Gulick*, 411 F.2d 696 (D.C. Cir. 1969). Disclosure, however, would never be required in the myriad of cases where, as here, it is clear from the surrounding circumstances[9] that the nominal decision-maker adopts as its own the reasoning of lower level staff or units.

As a matter of practical necessity, delegation of responsibility is commonplace within modern agencies and departments. To satisfy formal statutory requirements, however, decisions reached at lower administrative levels often receive the rubber-stamp approval of the head of the agency. It distorts the broad, remedial purposes of the Freedom of Information Act to permit this rubber-stamp to foreclose disclosure of the actual decisions to the public.

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[9] The Court of Appeals expressed concern that petitioner's argument would involve the Courts in "determining the care with which the decisional officers supervise their staffs . . ." (App. A, p. 16.) Where, however, it is clear from the agency's procedures that the actual locus of decision-making lies at a lower administrative level, any intrusion into agency decision-making is *de minimus* and can be easily controlled, as it is in many other similar cases, by the trial court.

This case presents, in a different factual context, the same issue this Court has deemed worthy of review in *Renegotiation Board v. Grumman Aircraft Engineering Corporation*, No. 73-1316.[10] *Grumman* involves a request under the Freedom of Information Act for reports prepared by divisions of the full Renegotiation Board and by regional boards acting under a delegation of authority from the full Board. The Court of Appeals held that both kinds of reports are adopted by the full Board when it issues a decision in a case. *Grumman Aircraft Engineering Corp. v. Renegotiation Board*, 482 F.2d 710 (D.C. Cir. 1973).

The divisional reports at issue in *Grumman* are prepared by one of the members of the Board as a guide to some of the issues in an individual case. The division reports do not purport to cover all of the possible grounds for a decision, and other members of the Board can and do disagree with the reports while reaching a similar conclusion for different reasons. Brief of Petitioner in *Grumman* at 24-29. The regional reports and the entire file for each case are reviewed independently by staff for the full Board. *Id.* at 8-9. Thus, on the facts in *Grumman*, it is arguable that the full Renegotiation Board exercises true independent review over the divisional and regional recommendations, even though the Board issues no opinion or report of its own. It is possible, therefore, that this Court will not be required to render a decision in that case which fully treats the basic principle which is at issue. That

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[10] *National Labor Relations Board v. Sears, Roebuck and Company*, No. 73-1233, which will be argued in tandem with *Grumman*, involves related but different issues under §552(a)(2)(A).

principle – whether agencies which *in fact* adopt staff recommendations as their own must disclose those recommendations to the public – is too important to be decided on the peculiar facts of the *Grumman* case. This Court, therefore, should insure full consideration of this important issue by reviewing the instant case along with *Grumman.*

II. THE COURT OF APPEALS MISAPPLIED THIS COURT'S DECISION IN ENVIRONMENTAL PROTECTION AGENCY v. MINK.

Assuming *arguendo* that the summary statements are not final opinions adopted by NIMH, it is nevertheless clear that the statements are "identifiable records" which must be made available to the public unless they are exempt under one of the specific exemptions contained in the FOIA. 5 U.S.C. §552(a)(3). The Court of Appeals ruled, however, that the statements are covered by exemption 5 which protects from mandatory disclosure all "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. §552(b)(5). This ruling seriously misinterprets this Court's construction of exemption 5 in *Environmental Protection Agency v. Mink,* 410 U.S. 73 (1973).

In *Mink,* this Court reviewed the legislative history of exemption 5 and concluded that "Congress intended to incorporate generally the recognized rule that 'confidential intra-agency advisory opinions . . . are privileged from inspection.'" 410 U.S. at 86-87. But the Court also recognized that the privilege "has finite limits," and that the essential question is "whether production of the contested document would be 'injurious to the consultative functions

of government that the privilege of nondisclosure protects.'" 410 U.S. at 87. On the basis of this analysis, the Court concluded that exemption 5 "requires different treatment for materials reflecting deliberative or policy-making processes on the one hand, and purely factual, investigative matters on the other." 410 U.S. at 89.

The factual/deliberative test adopted in *Mink* has not been easy to apply and has caused considerable confusion and misunderstanding in the lower courts. This confusion is most evident in cases involving professional evaluations and opinions, such as the summary statements in this case. Because they are subjective, some courts including the Court below, have rigidly held that the evaluations are "deliberative" and protected by exemption 5. *E.g., Wu v. National Endowment for Humanities,* 460 F.2d 1030, 1032 (5th Cir. 1972) (evaluation of proposal for history research project is exempt because all "advice, recommendations, opinions, and other subjective material are protected"); *Owens v. U.S. Bureau of Prisons,* 379 F. Supp. 547 (D.D.C. 1974) (work, housing and progress reports prepared by federal prison staff and containing evaluations of a prisoner's conduct and readiness for release are exempt from disclosure.) Other courts have ruled that professional opinions, albeit not wholly objective, comprise the factual bases for agency decisions and should therefore be disclosed. *E.g., Tennessean Newspapers, Inc. v. FHA,* 464 F.2d 657, 660 (6th Cir. 1972) (appraisal report must be disclosed because it is the "finished work product of a professional"); *Vaughn v. Rosen,* Civ. No. 1753-72 (D.D.C., October 9, 1974) (evaluations of agency personnel management programs must be disclosed.)

Until the Court's ruling in *Mink* is clarified, many federal agencies will continue to withhold from the public professional evaluations which constitute the underlying factual

bases for their decisions. The summary statements involved here provide a good example. The statements contain a detailed analysis and critique[11] of every aspect of a project, including the experience and qualifications of the researchers, the availability of suitable facilities, the opportunity for cooperation with other departments and institutions, and the extent of any overlap with related research projects elsewhere in the country. These facts provide the underlying factual basis for the IRG's recommendation and for the ultimate funding decision.

Disclosure of the facts underlying NIMH's funding decisions is essential to enable the public to evaluate NIMH's research program. The peer review system established by HEW has been criticized for favoring applications from a few well-known institutions and ignoring more innovative projects from younger and lesser known researchers.[12] Similarly, there is mounting evidence that the IRGs do not take the risks to human subjects into account in their evaluation of proposed projects.[13] The public's evaluation of these and other important questions relating to NIMH

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[11] The IRG's recommendation for approval or disapproval and the brief summary of the reasons supporting the recommendation can easily be severed from the critique and withheld should the Court accept the argument in Point II of this petition that the critique is not within exemption 5. Severance would not be required, of course, under petitioner's argument in Point I.

[12] These criticisms are summarized in United States Office of Management and Budget, *The National Institutes of Health and National Institute of Mental Health Peer Review System* (1972).

[13] See, *e.g.*, Department of Health, Education and Welfare, *Final Report of the Tuskeegee Syphilis Study Ad Hoc Panel* (1973); *Hearings on the Quality of Health Care - Human Experimentation, 1973 before the Subcommittee on Health of the Senate Committee on Labor and Public Welfare*, 93d Cong., 1st Sess. (1973).

research grants is totally frustrated when it cannot obtain the facts underlying the agency's grant-making decisions.

Disclosure of the summary statements, on the other hand, would not be "injurious to the consultative functions" of the IRG. The names of the IRG members are public information; therefore, applicants already know the persons responsible for acting on their proposals. The summary statements themselves are anonymous and do not specifically identify comments or evaluations with individual members of the IRG. (App. B, p. 6.) Finally, researchers are able to obtain from NIMH the substance of the summary statements, although not the statements themselves, if they wish to know the basis for an adverse decision on their application. (App. B, p. 7.) Disclosure of the statements to the public would therefore not make more information available for scrutiny than is already available to the researchers themselves.

Congress did not intend to exempt professional evaluations and reports, such as the summary statements here, from disclosure to the public. The legislative history of the Act makes clear that Congress intended only to protect those advisory opinions concerning "legal and policy matters" the disclosure of which would seriously impede government decision-making. S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965). Professional evaluations do not contain the "exchange of ideas," H. Rep. No. 1497, 89th Cong., 2d Sess. 10 (1966), concerning policy matters which exemption 5 was intended to protect. Rather, they provide the underlying factual bases for agency actions which *Mink* made subject to mandatory disclosure. This Court should, therefore, take this opportunity to correct the narrow and limiting interpretation of exemption 5 adopted by the Court of Appeals and other courts which have misconstrued the test announced in *Mink*.

CONCLUSION

Petitioner prays that a writ of certiorari be granted.

Respectfully submitted,

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APPENDIX A

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 74-1027

WASHINGTON RESEARCH PROJECT, INC.

v.

DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, et al., APPELLANTS

Appeal from the United States District Court for the District of Columbia

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Decided September 12, 1974

David M. Cohen, Attorney, Department of Justice, with whom *Irving Jaffe*, Acting Assistant Attorney General, *Earl J. Silbert*, United States Attorney and *Leonard Schaitman*, Attorney, Department of Justice, were on the brief, for appellants. *John A. Terry* and *Michael J. Ryan*, Assistant United States Attorneys, also entered appearances for appellants.

Michael B. Trister for appellee.

Bruce R. Hopkins and *Robert O. Tyler* filed a brief on behalf of the Association of American Medical Colleges as *amicus curiae* urging reversal.

Before McGOWAN and ROBB, *Circuit Judges*, and STANLEY A. WEIGEL,* *United States District Judge for the Northern District of California.*

Opinion for the Court filed by *Circuit Judge* McGOWAN.

McGOWAN, *Circuit Judge*: Appellee brought this action in the District Court to compel disclosure under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, of certain information pertaining to eleven specifically identified research projects that had been approved and funded by the National Institute of Mental Health (NIMH), a unit of the Public Health Service of the Department of Health, Education, and Welfare (HEW). The eleven projects all involve research into the comparative effects of various psychotropic drugs on the behavior of children with certain learning disabilities. After *in camera* inspection of sample documents, the District Court ordered disclosure of all of the information sought, except that it contemplated that certain deletions might conceivably be made in respect of statements of opinion about the qualifications and competence of applicants for grants. The court further ordered the agency to amend its application instructions and regulations to conform with its decision. 366 F. Supp. 929. For the reasons hereinafter appearing, we affirm in part and reverse in part.

I

The information in dispute is contained in three types of documents:

1. *The Grant Application.*

   The initial grant application, among other things, identifies the research applicant, any research organization with which he may be affiliated, his qualifications and experience, the budget estimates,

* Sitting by designation pursuant to Title 28 U. S. Code Section 292(d).

and the research protocol or design. Subsequent to the approval of the initial grant application, there may be filed continuation applications, renewal applications, and supplemental applications. Projects are approved for a specific "project period" that may extend over several years, 42 C.F.R. § 52.2 (b), but a continuation application must be filed each year to report progress to date and justify support for the coming year. *Id.* § 52.14(d). Renewal applications are required for periods beyond the originally scheduled project period, while supplemental applications are required for additional grants awarded because the amount previously awarded proves inadequate to carry out the project properly. *Id.*[1]

2. *The Site Visit Report.*

Outside consultants, engaged by HEW to review the grant application, frequently visit the location at which the research is proposed to be done, and thereafter prepare a report on their observations.

3. *The Summary Statement ("pink sheet").*

When the outside consultants have completed their work, an NIMH staff member assigned to them prepares a summary of their observations and deliberations and reports their recommendations. This statement will draw upon the site visit reports, if any.

The process by which applications are processed by NIMH and HEW, an understanding of which is necessary to appraise the significance of each type of document for FOIA purposes, is set out in considerable de-

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[1] We consider that continuation, renewal, and supplemental applications are all incident to the initial application; and we see no reason to distinguish between them for purposes of their availability to disclosure under FOIA.

tail in the opinion of the District Court. Accordingly, we begin with only a brief recapitulation of how the process works.

Research of the type sponsored by NIMH is often of a highly sophisticated and specialized nature. In order to assure competent evaluation of each proposal, a system of so-called "peer review" has been established, using the expertise of nongovernmental consultants functioning in panels organized around particular specialized disciplines within the broader field of biomedicine. These panels, called "initial review groups" (IRGs), consist of from ten to twenty members, only one of whom, the Executive Secretary, is an NIMH employee.

Applications for NIMH research support are referred by the Executive Secretary to one member of the IRG as "primary assignee," and one or more other members with secondary responsibility. These assignees undertake to evaluate the application and gather such additional information as may be necessary to that task. This may involve a "site visit" to the facility at which the applicant proposes to conduct his research. A site visit may be made, for example, in order to observe an experimental technique to be used in the proposed research.

An evaluation of each application, and a site visit report where applicable, are written by the assignee group and circulated to the whole IRG, together with the application, prior to its next meeting. (IRGs meet three times a year.) The application is discussed at length and a recommendation voted. If approval is recommended, it is also given a relative priority rating since the cost of all proposals deemed worthy of funding may exceed the funds available.

Following the IRG meeting, the Executive Secretary prepares a Summary Statement for each application acted upon. The Summary Statement describes the pro-

posal and recounts the substantive considerations that led the IRG to recommend approval or disapproval. It contains an opinion of the professional qualifications of the sponsor and an evaluation of his competence and facilities. The IRG's evaluation of the risk to human subjects, if any, is included, as is also a reference to the site visit report, if there is one. If there is a minority of two or more, the minority's view is also summarized, without attribution by name. The Executive Secretary may add a "Note" in order to clarify any matter not resolved by the IRG, call attention to factors other than scientific merit, including policy considerations, or incorporate information obtained subsequent to the IRG meeting at which the application was considered.

Each application and the corresponding pink sheet is submitted to the National Advisory Mental Health Council (NAMHC),[2] which was established to "advise, con-

[2] The District Court stated that "the Council members do not receive individual grant applications. Their decision is based solely on the review group Summary Statements." 366 F.Supp. at 934. The NIMH Handbook for Initial Review Staff states, however, that the NAMHC "reviews each application and its accompanying Summary Statement." P. 38. This publication was in the record before the District Court as Plaintiff's Exhibit No. 1. The only contradictory indication seems to be a statement in the deposition of Dr. R. S. Lipman, Chief of the Clinical Studies Section, Psychopharmacology Research Branch, NIMH. Dr. Lipman was Acting Executive Secretary at the time of his deposition, and was familiar with the operation of the IRGs but not with that of the NAMHC. When asked whether the latter group acted solely with the Summary Statements before it, he replied (p. 102):

> A. I believe, and I am really talking off the top of my head, I believe they have all of the pink sheets and then they can have made available to them any particular grant [application] that they have a particular question about.

[Continued]

sult with, and make recommendations to" the Secretary on Public Health Service activities in the field of mental health, 42 U.S.C. § 218(c). The NAMHC is composed of three officials—the Assistant Secretary for Health, the chief medical officer of the Veterans Administration, and a medical officer designated by the Secretary of Defense —and twelve private citizens appointed by the Secretary on the basis of their qualifications in science, medicine, and/or public affairs. 42 U.S.C. § 218(a).

The NAMHC may approve, disapprove, defer consideration of, or require additional IRG consideration of, any application. On occasion it does reject an IRG's recommendation of approval or disapproval,[3] but ordinarily, instead of passing upon the scientific merits of each application, it gives primary attention to policy direction and emphasis, generally acting on applications in subject matter groups. Applicants are notified of the outcome, but only about 90% of those receiving approval are actually funded by NIMH, to which the Secretary has delegated this function, due to limitations on funds. There is some ambiguity as to whether funding is determined solely on the basis of the ratings given by the IRGs and NAMHC, but the ratings may be presumed to be very influential in the funding decision.[4]

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[2] [Continued]
The best evidence of what the practice is would appear to be the official publication on which both parties have relied extensively and the accuracy of which neither has questioned in any particular.

[3] Instances are related in HOUSE COMM. ON GOVERNMENT OPERATIONS, THE ADMINISTRATION OF RESEARCH GRANTS IN THE PUBLIC HEALTH SERVICE, H. REP. No. 800, 90th Cong., 1st Sess. 62 (1967).

[4] The District Court stated that "[g]eneral priorities for funding are determined by the Director of NIMH, with the advice of the [NAMHC]," and no further elaboration is pos-

Each month NIMH makes public a list of all research grants awarded during the preceding month, including a general description of the project and its budget, and releases final progress reports received, except that release may be delayed up to six months pending publication by the researcher in a scholarly journal. The research design, proposed methods, and specific aims of a project are not made public, nor are the names or proposals of any applicants whose applications are disapproved.

II

The Freedom of Information Act requires disclosure, upon request, of the final opinions and identifiable records of each agency of the government, unless, in the case of the latter, they come within one of the nine specific exemptions in the Act. The burden of proof is on the agency opposing disclosure, and the exemptions therefrom are narrowly to be construed. The government relies upon three separate exemptions to justify nondisclosure of the various types of information here sought, as follows:

1. Exemption 4, for trade secrets and commercial or financial information received in confidence, is invoked to cover the research designs submitted in applications and described in the Summary Statements, site visit reports, and progress reports.

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sible on the basis of this record. *See* Def. Exh. No. 2, *U. S. Government Information Policies and Practices—Public Access to Information from Executive Branch Advisory Groups, Hearings Before a Subcomm. of the House Comm. on Government Operations,* 92d Cong, 2d Sess., pt. 9, at 3619 (1972) (Statement of Dr. John F. Sherman, Deputy Dir., NIH). The finding that "[w]ithin these general priorities [approval] is in the order of numerical priority set by the [IRG]" is very likely correct, however, since often nobody other than the IRG will examine the scientific merit of a particular application.

2. Exemption 5, for inter-agency or intra-agency memoranda that would not be subject to discovery in litigation, is said to cover the Summary Statements and site visit reports in their entirety, except insofar as purely factual information is involved.[5]

3. Exemption 6, which applies to personnel, medical, and "similar" files the disclosure of which would be a clearly unwarranted invasion of personal privacy, is raised with respect to statements of opinion in the Summary Statements and site visit reports as to the professional qualifications and competence of applicants who received grants.

A. Exemption 4.

The essence of the argument that the research designs submitted in the expectation of confidentiality are trade secrets or commercial information is that "ideas are a researcher's 'stock-in-trade.'" Their misappropriation, which, it is claimed, would be facilitated by premature disclosure, deprives him of the career advancement and attendant material rewards in which the academic and scientific market deals, in much the same way that misappropriation of trade information in the commercial world deprives one of a competitive advantage. Indeed, the government has been at some pains to argue that biomedical researchers are really a mean-spirited lot who pursue self-interest as ruthlessly as the Barbary pirates did in their own chosen field. Whether this is the sad truth, or whether, as appellee suggests, "secrecy is antithetical to the philosophical values of science," is not, however, an issue in this case; the reach of the exemption for "trade secrets or commercial or financial informa-

[5] The purely factual information in these documents has been released by NIMH voluntarily.

tion" is not necessarily coextensive with the existence of competition in any form.

It is clear enough that a non-commercial scientist's research design is not literally a trade secret or item of commercial information, for it defies common sense to pretend that the scientist is engaged in trade or commerce.[6] This is not to say that the scientist may not have a preference for or an interest in nondisclosure of his research design, but only that it is not a trade or commercial interest. To the extent that his interest is founded on professional recognition and reward, it is surely more the interest of an employee than of an enterprise,[7] and we are far from persuaded that Congress intended in Exemption 4 to apply terms drawn from the business

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[6] Public Health Service regulations provide that "[a]ny corporation, institution, agency or other such person, other than an individual, that is organized or operated for profit" is ineligible to receive a grant award. 42 C.F.R. § 52.11(a)(2). Only an individual grantee engaged in profit-oriented research, or a non-profit organization that engages in profit-making ventures based on biomedical research, could conceivably be shown to have a commercial or trade interest in his research design. For the eleven grantees whose protocols are sought in this case, however, their institutional affiliations with colleges and universities (7), research institutes (2), hospitals and state agencies (1 each), make this possibility extremely remote. In addition it is established by an undenied allegation in the complaint that "[n]one of the grants is concerned with the production or marketing of the drugs being tested." ¶ 9, JA 5. This does not absolutely preclude the possibility of commercial activity, but in any event, the burden of showing the trade or commercial character of the research design information was on the agency, and since it did not introduce a single fact relating to the commercial character of any specific research project, it can hardly have carried its burden on this point.

[7] *See* note 6, *supra*.

context to the employment market.[8] We cannot, consistent with the Act's recognized mandate to construe exemptions narrowly, *see Vaughn v. Rosen*, 484 F.2d 820, 828 (D.C. Cir. 1973), *cert. denied*, 42 U.S.L.W. 3523 (March 18, 1974); *Getman v. NLRB*, 450 F.2d 670, 672 (D.C. Cir.), *stay denied*, 404 U.S. 1204 (1971), extend them by analogies that lead so far away from the plain meaning of Exemption 4. Consequently, we hold that research designs submitted in grant applications are not exempt from disclosure under the Act. This holding extends to all types of applications—initial, continuation, supplemental, and renewal—and to progress reports made by grantees as part of the last three kinds of applications.

B. Exemption 5.

The applicability of Exemption 5 to the site visit reports made by members of the IRG, and to the Summary Statement written by the Executive Secretary to report on the IRG's recommendation to the NAMHC, turns on whether the IRG is an "agency" under the Administrative Procedure Act, of which the FOIA is a part. If the IRG is indeed an agency, then appellee's position that the Summary Statements and accompanying site visit reports constitute its final opinions, which must be made available, 5 U.S.C. § 552(a)(2)(A), is not without force. If, on the other hand, the IRG is not an agency but merely a unit within another agency, then these documents are identifiable records in the hands of that agency and it is our task to determine whether they are exempt from disclosure as intra-agency memoranda.

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[8] *See* Restatement of Torts § 757, Comment *b* (1939): "*Definition of trade secret.* A trade secret may consist of any formula, pattern, device or compilation of information which is *used in one's business*, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it." (Emphasis added.)

1. The IRG as an agency *vel non.*

The APA defines the term "agency" to mean "each authority of the Government of the United States, whether or not it is within or subject to review by another agency," with certain specific exceptions not applicable in this case. 5 U.S.C. § 551(1). The generality of this definition has required the commentators that have dealt with it to attempt an elaboration along more functional lines than the phrase "each authority" conveys,* but recent cases have made it clear that any general definition can be of only limited utility to a court confronted with one of the myriad organizational arrangements for getting the business of the government done. *See Grumman Aircraft Engineering Corp. v. Renegotiation Board*, 482 F.2d 710 (1973) (Regional Boards) (hereinafter *Grumman II*), *cert. granted*, 42 U.S.L.W. 3645 (May 28, 1974); *Soucie v. David*, 449 F.2d 1067 (D.C. Cir. 1970) (Office of Science and Technology); *International Paper Co. v. FPC*, 438 F.2d 1349 (2d Cir. 1971) (Staff of FPC); *Larche v. Hannah*, 175 F.Supp. 791 (W.D. La. 1959) (Civil Rights Commission), *rev'd on other grounds*, 363 U.S. 420 (1960). The unavoidable fact is that each

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* *See* FINAL REPORT OF THE ATTORNEY GENERAL'S COMM. ON ADMINISTRATIVE PROCEDURE, S. DOC. NO. 8, 77th Cong., 1st Sess. 7 (1941) ("the power to determine, either by rule or by decision, private rights and obligations"); 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 1.01, at 1 (1958) ("a governmental authority, other than a court and other than a legislative body, which affects the rights of private parties through either adjudication or rulemaking"); Freedman, *Administrative Procedure and the Control of Foreign Direct Investment*, 119 U. PA. L. REV. 1, 9-10 (1970): "Where a center of gravity lies, where substantial 'powers to act' with respect to individuals are vested, there is an administrative agency for purposes of the APA. . . . [But] a definition stated thus broadly is not self-applying. It is an abstract proposition that does not neatly decide concrete cases."

new arrangement must be examined anew and in its own context.

Congress has authorized the Secretary of HEW to make only such mental health and medical research grants "as are recommended" by the various National Advisory Councils, in this case the NAMHC, 42 U.S.C. § 241(d), (i), that it established. 42 U.S.C. § 218.[10] It also, however, authorized the Secretary to "appoint such advisory committees (in addition to those authorized to be established under other provisions of law) . . . as he deems desirable for the purpose of advising him in connection with any of his functions," 42 U.S.C. § 217a(a), and to compensate nongovernmental members thereof. *Id.* at § 217a(b).[11]

The authority to establish advisory committees by administrative action was first exercised in the period after World War II, when the vast expansion of supported biomedical research made it "impractical to encompass in a council membership the expertise in all the numerous disciplines, fields, specialties, and areas represented in biomedical research proposals. . . . To overcome these deficiencies, initial review groups were established to assist the councils." S. REP. No. 93-381, 93d Cong., 1st Sess. 38 (1973). In 1968, when NIMH was established as a distinct part of HEW, this system was carried over with the creation of the NAMHC, and the Institute's decision to create the IRGs. *Hearings*, *supra* note 4, at 3620-21. The NIMH dual review process remains, however, "less formal" than that of the NIH: "IRGs are established or phased out as required by the

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[10] This system originated with the National Cancer Institute Act, which created, in addition to the Institute, the National Cancer Advisory Council. Ch. 565, § 3, 50 Stat. 560 (1937).

[11] *As added*, Pub. L. No. 87-838, 76 Stat. 1073; *see* Public Health Service Act § 301, ch. 373, § 301, 58 Stat. 691 (1944).

size and nature of the grant review workload. . . ." S. REP. No. 93-381, *supra*, at 38. Ad hoc IRGs are formed to advise on particular applications "not within the competence" of any then-standing group. NIHM Handbook, *supra* note 2, at 9.

Under the prior decisions of this court, we think the IRGs are advisory committees, performing staff functions through the medium of outside consultancy, and are not agencies. The considerations raised in *Soucie v. David*, *supra*, and *Grumman II*, *supra*, point unmistakeably to this conclusion, which comports with our present impression of how this question should be handled. *Soucie* involved the status of the Office of Science and Technology, which, in addition to advising and assisting the President in coordinating federal policy for science and technology, was also authorized, as we emphasized, independently to evaluate federal programs.[12] It was created by an executive reorganization plan submitted to Congress and "explicitly considered" by the House. *Id.* at 1074. Congress approved the plan with the understanding that it was "delegating [to OST] some of its own broad power of inquiry in order to improve the information on federal scientific programs available to the legislature." *Id.* at 1075. It "clearly contemplated," as did the Executive, "that the OST would function as a distinct entity and not merely as part of the President's staff." [13] Finally,

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[12] "If the OST's sole function were to advise and assist the President, that might be taken as an indication that the OST is part of the President's staff and not a separate agency. In addition to that function, however, OST inherited from the National Science Foundation the function of evaluating federal programs. . . . By virtue of its independent function of evaluating federal programs, the OST must be regarded as an agency subject to the APA and the Freedom of Information Act." 448 F.2d at 1075.

[13] The executive branch represented the proposed OST as being organizationally analogous to the Bureau of the Budget,

we noted that since the OST had published FOIA regulations, it had apparently considered itself, prior to the litigation, to be an agency subject to the APA—a consideration of some weight. *Udall v. Tallman*, 380 U.S. 1, 16 (1965). All of these factors taken together led to the determination that OST exercised "substantial independent authority," and to the conclusion that it was an agency subject to the Freedom of Information Act.

Some of the same factors considered in *Soucie* were present in *Grumman II*, which dealt with the status of the Regional Boards established by the Renegotiation Board. The Regional Boards' exercise of formal decision making power delegated from the National Board was found to be "within Congress' [sic] contemplation when it established the Renegotiation Board apparatus." Indeed, the statutory authorization there at issue was expressly that of delegating functions "to any *agency* of the Government, *including any such agency established by the Board.*" 50 U.S.C. App. § 1217(d) (emphases added). Further, the National Board had promulgated FOIA regulations for disclosure of some Regional Board documents, again indicating its own view, prior to litigation, that they were agencies subject to the FOIA. Furthermore, the Regional Boards fell squarely within the analytic definition supplied by Professor Freedman, whose consideration of this question is the fullest and most discerning, namely, they were the body in which "substantial 'powers to act' with respect to individuals [were] vested." Freedman, *supra* note 9, at 9. They had their own staffs to investigate and negotiate with contractors,

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the Council of Economic Advisors, the National Security Council and the Office of Emergency Planning. 448 F.2d at 1075 & n. 22. Congress contemplated that OST would be sufficiently distinct from the President's staff to be beyond the reach of executive privilege and thus responsible to Congress.

and their "recommendation is communicated openly to the contractor prior to any assumption of jurisdiction by the National Board." 482 F.2d at 715. They were, in short, the agency with which an affected member of the public dealt, and from whose decision appeal might lie, depending upon the amount in controversy.

The contrast between the agencies involved in *Soucie* and *Grumman II*, on the one hand, and the IRGs, on the other, could not be greater. Unlike the OST, the IRGs do confine themselves to making recommendations; authority to make grants is vested in the Secretary, and authority to recommend doing so lies with the NAMHC. The IRGs act as consultants to the NAMHC; their members are strictly forbidden from communicating their group's recommendations to applicants. NIMH Handbook, *supra* note 2, at 30. Applicable regulations and administrative rules within NIMH and HEW have consistently reflected the view that the IRGs are not subject to the FOIA, *see id.*; 45 C.F.R. §§ 5.72(b), 5.73(a); and the authority under which they are appointed gives no hint of a congressional expectation that NAMHC's delegation of the initial review function would somehow make either more or less information available to the legislature or the public.

Clearly, the work now done by IRGs could again be done by the NAMHC if it sat continuously instead of meeting three times a year for about two days each time. Employing consultants to improve the quality of the work that is done cannot elevate the consultants to the status of the agency for which they work unless they become the functional equivalent of the agency, making its decisions for it. There is no doubt in this instance that the usually perfunctory review the NAMHC gives to a particular application—as opposed to the group of which it is a part—makes the IRGs' recommendations an often crucial element in the approval process. But, just as the

APA makes the fact that a government authority's decisions are subject to review irrelevant in determining whether that authority is an agency, at least in this case the degree of scrutiny its decisions are given on review is equally beside the point.

The important consideration is whether it has any authority in law to make decisions. The IRGs have not; their favor is not necessary because the law empowers the Secretary to make grant awards if (and only if) the NAMHC so recommends. The fact that the NAHMC may be greatly influenced by the IRG's expert view does not make the IRG an agency. *See International Paper Co. v. FPC*, 438 F.2d 1349, 1359 (2d Cir. 1971). In *Soucie* this court did not consider whether the President generally accepted the advice of OST. In that case and in *Grumman II* we looked to the functions that OST and the Regional Boards respectively were empowered by law to perform. The alternative would inevitably involve the courts in determining the care with which the decisional officers of government agencies supervise their staffs, in order to determine whether in fact the staff is not the stand-in for the officer or agency—its recommendations his decisions—and whether it ought not therefore in law to be held accountable as the agency. This we cannot do. *Morgan v. United States*, 304 U.S. 1, 18 (1938); *United States v. Morgan*, 313 U.S. 409, 422 (1941).

That is not to say that a staff recommendation may never achieve the dignity of an agency's final decision; it may do so when the agency adopts it as its own, and at that point its disclosure can be required. *American Mail Line, Ltd. v. Gulick*, 411 F.2d 696 (D.C. Cir. 1969) is a case in point. There the question was "whether an administrative agency [the Maritime Subsidy Board] may take affirmative action against a private party by means of a decision in which it states that

the only basis for such action is a certain specified [staff] memorandum and then refuse to disclose the memorandum to the party affected by the action." While the question was answered in the negative, the reason was that the agency had made the memorandum the express and only basis for its decision and not that it had made the staff into the "agency." In the present case, however, leaving aside the problem of whether even the denial of a grant award is "affirmative action" against an applicant, the reasoning of the IRG is not the "only basis" for the Secretary's decision. The Executive Secretary's Note and the NAMHC's policy choices, and in some instances the latter's particularized scrutiny, intervene.[14] *Cf. Sterling Drug, Inc. v. FTC*, 450 F.2d 698, 706 (D.C. Cir. 1971). We hold, therefore, that the IRG is not itself an agency under the APA nor, consequently, subject to the strictures of the FOIA.[15]

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[14] The result may be that there is no "final opinion" of the agency—NIMH—accompanying its decision on whether to make a grant award. Whether this comports with existing notions of administrative fairness is not an issue in this case, nor do we see how it could be an issue for the courts in the absence of a legislative provision for judicial review of the decision.

[15] The rather sparse legislative history of Section 2 of the APA is collected in Freedman, *supra* note 9, at 6-12, and analyzed with reference to the meaning of "agency." That history tends to confirm our view that IRGs are not agencies. STAFF OF SENATE COMM. ON THE JUDICIARY, REPORT ON THE ADMIN. PROC. ACT, 79th Cong., 1st Sess. 13 (Comm. Print 1945): "'Authority' means any officer or board, whether within another agency or not, which by law has authority to take final and binding action with or without appeal to some superior administrative authority." *See* H. REP. NO. 1980, 79th Cong., 2d Sess. 19 (1946). *See also* ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 9 (1947).

Whether the IRG is subject to the disclosure requirements of the Federal Advisory Committee Act, 5 U.S.C. App. I, § 10, is not a question before this court. We note, however, that

2. Application of Exemption 5.

Having decided that the IRG is not an agency, nor its Summary Statements and site visit reports the final decisions of an agency, it becomes necessary to determine just how much of the disputed information in these intra-agency documents is exempt from disclosure. Exemption 5 applies only to matters "which would not be available by law to a party other than an agency in litigation with the agency." While there are often problems in determining the precise scope of the exemption without the benefit of actual litigation the nature of which informs the breadth of discovery, *see Environmental Protection Agency v. Mink*, 410 U.S. 73, 86 (1973), its application in this case is relatively uncomplicated. As a general proposition Exemption 5 does not shield from disclosure "purely factual, investigative matters," as opposed to "materials reflecting deliberative or policy-making processes." *Id.* at 89. Even purely factual matter may be exempt, however, if it is inextricable without compromise of the deliberative process, *id.* at 91, and so too may be "a summary of factual material [that] is part of the deliberative process," even though the facts themselves

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that Act makes the FOIA standards applicable to advisory committees' reports and other papers only insofar as the head of the agency to which the committee reports fails to determine in writing that the reports or documents contain information within an exemption to the FOIA. *Id.* § 10(d). Whether such a determination has been made respecting IRG reports is not disclosed by the record in this case. *But see* Summary Statement, Dept. of HEW (Notice of determination to close certain meetings under authority of Executive Order 11671 of June 5, 1972), in *U. S. Government Information Policies and Practices, supra* note 4, at 3638, which made the same determination under the pre-Committee Act regime established by executive order. Similarly, the court is not now called upon to decide whether failure to make such a determination subjects the affected information to disclosure at the instance of "any person" as under the FOIA.

are elsewhere on the public record. *Montrose Chemical Corp. v. Train*, 491 F.2d 63 (D.C. Cir. 1974).

In order to apply these propositions to the facts at bar, the contents of the Summary Statements and site visit reports need further elaboration at this point. We take as our texts appellee's Exhibit 1, the NIMH Handbook, *supra* note 2, at 33-36, documents as illustrated by the sample submitted to the court. The Summary Statements begin with (1) a concise resume, "no more than six or seven sentences," of the proposed project, its review by the IRG, and the reasons for the IRG's recommendation, including the contrary reasons offered by a minority.[16] There follows (2) a "brief description of the proposal," its "aims, methodology, and, for renewal, supplemental and revised proposals, the background or history." The next and "most critical" section is the IRG's critique (3) which discusses "the strengths and weaknesses of various aspects of the proposal in detail." [17] The "background and competence" of the applicant and his associates (4) are discussed, as are (5) "any special aspects of the facilities and equipment and the extent of departmental and interdepartmental cooperation" at the

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[16] From the Summary Statement submitted for *in camera* inspection it appears that exemption is claimed for the resume of the IRG's review and reasons, but not for the resume of the project itself, which gives only the most general indication of its subject matter and cannot be regarded as anything but purely factual and nonexempt.

[17] The critique is specifically directed to the following issues:

> Are the aims logical? Is the approach valid and adequate? Are the procedures feasible? Is the research likely to produce new data and concepts or confirm existing hypotheses? What is the significance and pertinence of the proposed work with regard to the state of the field and importance of the aims? For continuation and supplemental requests, comment on past progress.

applicant's institution. The proposed project budget is then analyzed with reference to its adequacy, justification, and projected duration (6). Supplemental requests are related to previously approved amounts.[18] To all of this may be appended (7) the Executive Secretary's Note, described *supra* at p. 5, (8) the minority report of two or more dissenting members, and (9) a summary of any site visit report.

The site visit report itself contains, in addition to purely identifying material, such as application number, date, and persons seen, (10) evaluations of the proposal, the investigator, and his staff, (11) sections on the facilities and other support available at the institution and (12) the budget, and (13) "other comments." Because of the substantial overlap necessary between the site visit report and Summary Statements, site visitors are advised to follow the format for the latter document "since the site visit report, if accepted by the [IRG], can serve as a basis for the Summary Statement." NIMH Handbook, at 46.

From this mere recitation it is clear that most of the matters called for in the site visit report and Summary Statement for each application are evaluative, and call into play the policy of protecting the deliberative process, at which Exemption 5 is directed. *See EPA v. Mink, supra; Soucie v. David, supra.* Indeed, the only matters that are even arguably subject to compelled disclosure are the Summary Statements' (2) description of the proposal, its aims and methodology, and any factual matter contained in (9) the summary of the site visit report. In the site visit report itself, only (11) the statement of facilities, and (12) the budget, merit comment.

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[18] When the IRG is an ad hoc committee, the names and institutional affiliations of each reviewer are listed. Five additional criteria are to be addressed in the case of foreign applications.

Of these four items, the two (2 and 9) in the Summary Statement are abstracts of other information—either the site visit report or portions of the underlying application. As such we think them covered by the reasoning of *Montrose Chemical, supra.* That case involved application of Exemption 5 to summaries, made by agency staff attorneys, of evidence developed at a public hearing. The summaries were prepared for and submitted to the Administrator of the Environmental Protection Agency "to assist [him] in his study of the record" on the basis of which he was obliged to make a decision. This court held the summaries exempt as an integral part of the deliberative process. Sensitive to the necessity of attaching varying degrees of significance to different facts in the course of epitomizing the record, we said:

> Even if they cited portions of the evidence verbatim, the assistants were making an evaluation of the relative significance of the facts recited in the record; separating the pertinent from the impertinent is a judgmental process, sometimes of the highest order; no one can make a selection of evidence without exercising some kind of judgment, unless he is simply making a random selection. 491 F.2d at 68.

No significant difference distinguishes the present case from *Montrose Chemical.* The research design and description of methodology in the application submitted for *in camera* inspection covers fifteen, single-spaced typewritten pages; their description in the Summary Statement is one page in length.[19] In the *Montrose Chemical* paradigm, the judgmental element arises through the necessity to select and emphasize certain facts at the expense of others. In the instant case, where the whole

[19] The site visit report, which is two and one-half pages in length, is not summarized but rather incorporated by reference. Were it summarized the principle discussed in the text would apply equally to that summary.

proposal must be described at least in general, various aspects of it are described in greater detail than others. In virtually every sentence the author must operate at a level of specificity that reflects his personal perspective on the material being summarized.

An example may be taken from the Summary Statement before us without compromising any information for which exemption is claimed. In the course of describing a proposal for evaluating the relative efficacy of a number of drugs in the treatment of hyperkinetic children, the following statement appears: "The assessment battery consists of a number of rating scales, and various cognitive and performance measures." Significantly, however, while the various performance and cognitive tests are then enumerated, the rating scales are neither identified nor described, but are said only to have proved sensitive in prior, unspecified studies. This difference of treatment may well reflect no more than the greater ease with which named tests can be referenced than rating scales described. It may, on the other hand, reflect the view that certain well-known tests have a definite reputation for reliability, and that rating scales are only so much surplusage. A different group of reviewers with a different set of views might well have elaborated on the rating scales' utility and never specified the cognitive and performances tests proposed. What the effect of such a choice might be on the proposal's prospects we need not guess. The point is simply that choices are and must be made by someone or some group with a unique perspective, and decisions may be based on them. Accordingly, the two items under discussion must also be held exempt from disclosure.[20]

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[20] As in *Montrose Chemical*, the court does not confront a situation in which the underlying information, a summary of which is determined to be exempt, is itself secreted from public inspection, and in which we said "a different result might be reached." The proposals summarized in item (2)

The NIMH Handbook alone does not indicate whether the two items in the site visit report—(11) the facilities and (12) budget references—are meant to be narrative or analytic. The representative site visit report submitted to the District Court, which is of controlling significance,[21] suggests the latter, however, at least with respect to budgetary considerations. The short section on the budget relates the amount requested to the site visitors' analysis of the amount needed, and suggests for IRG consideration a possible economizing step. As such, it is clearly a part of the deliberative process and exempt from compelled disclosure. But this particular report makes no reference to the matter of facilities, neither describing nor rendering an opinion on the adequacy of the facilities available to the grant applicant.[22] The entire document, however, other than the opening paragraphs which describe the proposal and for which no claim of exemption is made, is an expression of the visitors' opinions and not a recitation of facts. This suggests that facilities references, if any, in the site visit reports for other of the applications sought by appellee would be of the same nature. In light of the parties' agreement, *supra* note 21, however, we need not choose between reliance on this speculation, with its potential effect of relieving the agency of its statutory burden of

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are available by virtue of our holding in Part II.A, *supra*. The site visit reports summarized in item (9), insofar as purely factual, were not even claimed to be exempt, although, as appellant points out, they have very little factual content.

[21] The parties "agreed that the determinations made by the court based on this example would control the disposition as to other similar material covered by plaintiff's request and presently withheld." 366 F. Supp. at 932.

[22] The proposal in question did not require the use of technical medical equipment, which undoubtedly made the question of facilities irrelevant to the IRG's evaluation of the application.

proof, and *in camera* inspection of all the site visit reports in suit. Finding no matter of the type sought in the controlling document, there is no relief respecting item (12) to which appellee can lay claim."

III

Appellant challenges the District Court's jurisdiction to order the agency to amend its regulations to conform with the court's opinion. The FOIA, it is contended, "grants jurisdiction to the district courts only to review agency denials of requests for specific documents and to enjoin withholding of those documents" from the person who made the request. That is of course true insofar as it goes, but is not responsive to whether the court may not draw on powers apart from, and unabridged by, the FOIA in order to give complete relief where

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" The District Court rejected appellant's argument that Exemption 6, which applies to certain files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, is an alternative ground for non-disclosure of any references, in the Summary Statements and site visit reports, to the professional qualifications or competence of a particular researcher. Our holding that the non-factual information in these documents falls within Exemption 5 extends to these expressions of opinion, and we therefore need not reach the merits of this argument.

Neither do we need to deal with the District Court's intimation that under certain circumstances HEW may delete from the site visit report or the Summary Statement an expression of opinion adverse to the qualifications or competence of particular individuals involved in the research project under consideration. The District Court, of course, found that these documents constituted the opinions of an agency and were disclosable as such; and it then referred to a provision of FOIA which says that an agency may make such deletions in an opinion. 5 U.S.C. 552(a)(3). We, of course, have reached a different conclusion on this latter score, and under our approach the deletion authority contained in the statute is not applicable.

it is due. "With the express vesting of equitable jurisdiction in the District Court by § 552(a), there is little to suggest, despite the Act's primary purpose, that Congress sought to limit the inherent powers of an equity court." *Renegotiation Board v. Bannercraft Clothing Co.*, 415 U.S. 1 (1974) (dictum).

One can imagine circumstances, such as where an agency simply refuses to conform its actions to the known requirements of the Act in order to deter requests for information by repetitive litigation, that would tempt a court to use any or all of "the usual weapons in the arsenal of equity," *Bannercraft Clothing Co. v. Renegotiation Board*, 466 F.2d 345, 354 (1972), *rev'd on other grounds*, 415 U.S. 1 (1974). In the case at bar, however, it is unnecessary to decide whether the District Court would be so empowered.

Appellee initiated the process culminating in this action by a letter requesting access to documents relating to eleven specifically identified research grants. When the request had been denied in part and administrative appeal exhausted, appellee filed a complaint the prayer of which requested that the court declare the plaintiff's right to disclosure of the disputed records and order their disclosure, and "[t]hat this Court declare invalid under the Freedom of Information Act the regulations issued by [HEW] which exempt from public disclosure all research protocols and all proposed grant applications." J.A. 6. In its opinion the District Court merely suggested that "[a]t a minimum, the defendants should promptly modify existing regulations and grant application instructions to bring them into conformity with the decision of this Court," but its order elevated this suggestion into an injunctive obligation presumably enforceable in the same manner as any injunction, namely, by contempt.

The FOIA requires each agency to make information, not exempt by the terms of the Act, available "in accordance with published rules." From this may readily be inferred an obligation to publish rules that accurately reflect the agency's substantive obligations under the Act, and rules that fail to do so are of no force when "any person" seeks access to information not exempt from disclosure under the Act. Pretermitting the very real question of whether a single request for documents creates a continuing case or controversy [24] sufficient to support an order to amend regulations of only speculative future effect on an FOIA plaintiff, there is no warrant in the record of this case for anticipating that HEW would not proceed in good faith to incorporate the substance of a final court decision into its rules and practices.

The District Court was sensitive to the public interest that the FOIA, "to the extent practical, be self-operative to assure prompt disclosure." It was equally aware of the necessity "that grant applicants be placed on notice that information submitted pursuant to an application for NIMH grant funds" is subject to public disclosure. We, of course, share the court's concern, but are without sufficient reason to doubt that appellant does also. Considerations of inter-branch comity impel us to withhold coercive orders that are not demonstrably necessary. *Cf. Nixon v. Sirica*, 487 F.2d 700, 712 (D.C. Cir. 1973).

What we have held hereinabove is that the eleven initial grant applications involved in this case (all of which had been approved by HEW), together with any continuation, renewal, or supplemental applications incident thereto (either approved or pending), are not exempt

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[24] The District Court itself prefaced its consideration of this prospective relief with the words, "Apart from resolution of the instant controversy . . . ."

from disclosure under the Freedom of Information Act. Contrarily, we have held that site visit reports and summary Statements are exempt under Exemption 5. The impact of this latter holding is limited in this case by the fact that HEW has voluntarily disclosed the purely factual matter contained therein, in an apparent recognition that such matters do not come within the purposes of the exemption. Lastly, we have found, in the circumstances of this record, an inappropriate exercise of equity jurisdiction in the District Court's injunctive command that HEW conform its regulations to the court's mandate.

The judgment of the District Court is, accordingly, affirmed in part and reversed in part; and the case is remanded for the entry of a decree consistent herewith.

It is so ordered.

APPENDIX B

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WASHINGTON RESEARCH PROJECT, INC., *Plaintiff,*	:	**Civil Action**
v.	:	**No. 1279-73**
DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, and CASPER W. WEINBERGER, *Defendants.*	:	

MEMORANDUM OPINION

Plaintiff invokes the Freedom of Information Act, 5 U.S.C. §552, and seeks to compel production of certain records from the Department of Health, Education and Welfare and one of its constituent agencies, the National Institute of Mental Health (NIMH). An injunction and declaratory judgment are sought. Plaintiff's written request for production, inspection and copying of specified records has been fully processed through appropriate administrative channels and the issues are accordingly properly before the Court, which has jurisdiction under 5 U.S.C. §552(a)(3).

On April 13, 1973, plaintiff requested, with detailed specification, documents relating to eleven designated research grants by the Psychopharmacology Research Branch of NIMH for studies on the drug treatment of children

with learning difficulties or behavioral disorders, particularly hyperkinesis. All but two of the research grants involve the use of one or a combination of stimulant or anti-depressant drugs, including methylphenidate (Ritalin), dextroamphetimine, thiroidazine and imipramine, on selected school age and/or pre-school children.

All of the grants are administered by public or private non-profit educational, medical or research institutions. None of the grants is concerned with the production or marketing of the drugs being tested. Their purposes include the determination of optimal dosage levels and treatment schedules; the identification of possible harmful side effects such as drug addiction and loss of weight; the measurement of the effect of different drugs on learning, including the existence of state-dependent learning; and the development of improved assessment techniques to measure the efficacy of drug treatment on children.

Following a series of conferences and administrative actions, which need not be reviewed here in any detail, a considerable number of documents were furnished. However, as of July 27, 1973, the following categories of documents were still being withheld, and it is upon these that the litigation has finally focused:

(a) with regard to previously approved grant applications, the narrative statement and any related exhibits describing in detail the research plan to be followed (sometimes referred to as the research protocol or research design);

(b) with regard to previously approved continuation, renewal or supplemental applications, the comprehensive progress reports describing the results and accomplishments of the projects since the last such report;

(c) the entire text of all site visit reports and "pink sheets" prepared by outside consultants and NIMH staff during the agency review of the applications;

(d) the entire text of all continuation and renewal applications which have not yet been approved.

For the purposes of analysis, these various documents will be referred to simply as grant applications, site visit reports, and "pink sheets."

After some discovery, the matter came before the Court for final hearing under an arrangement developed at a status conference. The parties presented *in camera* a portion of a single grant file marked to show the type of information defendant believes may properly be withheld under the Act. This file, as marked, was also given plaintiff informally. It was agreed that the determinations made by the Court based on this example would control the disposition as to other similar material covered by plaintiff's request and presently withheld. After the record was completed, the parties presented argument and were allowed to file post-trial briefs.

I. NIMH GRANT PROCEDURES

Before turning to the conflicting interpretations of the Freedom of Information Act presented by the parties, the nature of the material requested must be elaborated and its significance in the chain of the grant process explained.[1]

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[1] The following textual description of the NIMH grant review process is taken principally from the deposition of Dr. Ronald S. Lipman, Chief of the Clinical Studies Section of the Psychopharmacology Research Branch of NIMH and from the *NIMH Handbook for Initial Review Staff* (1970), plaintiff's exhibit 1 in evidence.

The National Institute of Mental Health operates a dual system of review for all major research projects. The first stage involves the initial review group (sometimes called a study section or review committee), made up of from 10-20 nongovernmental technical consultants, who are appointed by the Director of NIMH for overlapping terms of up to four years. Each branch or center of the NIMH is served by one or more review groups qualified in a specific field. There are approximately 20 NIMH review groups for research project grants, as well as review groups for long-term program grants, small grants, fellowships and training. There is an Executive Secretary for each review group who is an NIMH employee and a chairman who is appointed by the Executive Secretary.

Each application is assigned by the Executive Secretary to one or more members (assignees) of the initial review group for study and comment. Assignees are selected because of their experience and competence in the areas covered by the proposed research. Non-committee members may also be asked to review a project on an *ad hoc* basis, when the Executive Secretary feels that the committee itself lacks expertise in a necessary area.

When additional information is needed, the Executive Secretary may obtain it through correspondence, by telephone, or by a site visit conducted by the review group assignees. Site visits may also be requested by the assignees themselves when they believe it will aid in their review of the project. Site visits are generally used for unusually large or multidisciplinary applications, or when it is deemed important to meet personally with the investigator and his or her associates in order to observe the physical facilities and equipment which will be used or to observe a particular experimental technique in operation. Visitors

may make suggestions for changes in the proposed research plan, and a revised protocol or addendum is sometimes submitted to NIMH following the site visit.

At the conclusion of the site visit, the team meets in executive session to discuss their reactions and to formulate a recommendation. One assignee is delegated to write up the team's findings, sometimes with the assistance of written reports from the other visitors. The site visit reports are prepared on behalf of the team as a whole and they do not identify evaluations with particular members of the site visit team.

The site visit report or, when no site visit was held, a written evaluation prepared by one of the assignees is made part of a grant book which is sent to each member of the initial review group four to six weeks before its meeting. The grant book also contains a copy of the complete grant application for each project which is scheduled to be reviewed.

Initial review groups meet three times a year. The Clinical Psychopharmacology Research Review Committee, which reviewed the grants involved here, considers an average of ten to fifteen applications at each meeting, including supplemental and renewal applications.[2] Each proposed research project is reviewed separately for approximately 45

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[2] Supplemental applications are for additional funds above the amount previously approved for the current or any future project year. Renewal applications are for funds beyond the project period previously approved. Continuation applications are filed at the beginning of each year in the previously approved project period. Generally, supplemental and renewal applications must compete for available funds with other applications, new or otherwise; they are processed through both stages of the review process. Continuation applications are generally noncompeting and not subject to the review process.

minutes to an hour. The principal assignee describes the project and presents the findings of the site team visit. The other visitors also present a critique of the project, and NIMH staff may be asked to comment.

Following the discussion and after a consensus has been reached, a formal vote is taken on each project. If it is approved, each member of the committee then assigns a rating to the project, which is used for determining funding priorities. The minutes of each meeting contain a complete attendance list and data on the number of approvals, disapprovals and deferrals of applications considered, but they do not contain a summary of the discussion regarding any application.

After the meeting of the initial review group, an NIMH staff person prepares a Summary Statement ("pink sheet") for each grant, containing in a single document a brief description of the proposed research or training grant request and the substantive considerations that led to the specific recommendation, including in the case of a split vote the reasons for both majority and minority opinions. The Statement will normally discuss the background and competence of the investigators, any special aspects of the facilities and equipment, and whether the budget is appropriate to the aims and methodology of the project. Where human subjects are involved, the Statement should include the opinion of the review group on the risks involved. In addition, the site visit report, if one has been written, is incorporated by reference into the Statement.

All Review Committee actions are considered to be collective and anonymous. Therefore, the Summary Statement does not attribute evaluations or comments to any individual member. If two or more members voted against

the majority recommendation, their opinion is also summarized in the Statement, without identifying the members involved.

The Statements are the principal source of information regarding the application and the recommendation provided to the National Advisory Mental Health Council; they are also used by NIMH staff to provide information concerning disapprovals to applicants and to follow the results of approved projects. According to the NIMH Handbook, at 32, the Statements are "perhaps the most informative document in the history of the grant."

The second stage in the dual NIMH review process involves the National Advisory Mental Health Council, a body set up by statute to "advise, consult with, and make recommendations to, the [Secretary] on matters relating to the activities and functions of the [Public Health] Service in the field of Mental Health." 42 U.S.C. §218(c). The Council is specifically authorized "to review research projects or programs submitted to or initiated by it in the field of mental health and recommend to the Secretary . . . any such projects which it believes show promise of making valuable contributions to human knowledge with respect to the cause, prevention, or methods of diagnosis and treatment of psychiatric disorders." 42 U.S.C. §218-(c). The members of the Council are the Assistant Secretary for Health, the Chief Medical Officer of the Veterans' Administration, a medical officer designated by the Secretary of Defense, and twelve public members appointed by the Secretary of HEW.

The National Advisory Mental Health Council meets three times a year for two or three days to review the "recommendations" of all of the initial review groups within NIMH. The Council reviews from 500 to 1,000 grants

during each meeting. Except where a special request is made, the Council members do not receive individual grant applications. Their decision is based solely on the review group Summary Statements. Except for grants on which a special question is raised (no more than five percent of the grants), the Council approves the recommendations from each review group in a block. Consequently, the Council's concern is with questions of general policy and of program priority, and not with the scientific merit of any individual applications.

Following approval by the National Advisory Mental Health Council, funding of a project is contingent upon the availability of funds. General priorities for funding are determined by the Director of NIMH, with the advice of the National Advisory Mental Health Council. Within these general priorities, 90 percent of the approved grants are funded in the order of numerical priority set by the initial review group. Researchers are notified of the grant award by an award letter and a formal notice, both of which are signed by the NIMH branch chief. The award letter states that the project has been approved by the initial review group and the National Advisory Mental Health Council.

II. THE ACT

These procedures generate a prodigious amount of information concerning the proposed research projects and the allocation of funds among them. NIMH incorporates into its application instructions a warning that some of this information must be made available to the public under the Freedom of Information Act. However, it specifically assures the applicants that the following information does not fall within the terms of the Act and will not be disclosed to the public:

a. Applications for research grant support are considered to be privileged information. Until such time as an application is approved and a grant awarded, no information is disclosed except for the use of Section I of the application form PHS-398 and the notice of research project form PHS-166 by the Science Information Exchange in connection with its responsibilities for exchange of information among participating agencies.

b. Section II of the application form PHS-398 or the corresponding material in application form PHS-2590.

c. Details of estimated budgets.

d. Discussions of applications by advisory bodies[2a]

Plaintiff challenges this interpretation of the Act and NIMH's consequent withholding of substantial portions of the grant applications, "pink sheets," and site visit reports requested.

In resolving this dispute, the Court is faced with the initial difficulty that the Act on its face does not give special consideration to the field of medical research or the problem of grant applications. Accordingly, as is usually the case where the Court must attempt to apply this imprecise and poorly drafted statute to a situation apparently never contemplated by the Congress, it becomes necessary to resolve the controversy by reliance on the high

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[2a] National Institutes of Health, *Grant for Research Projects, Policy Statement* 14 (1972). This interpretation of the Act is consistent with HEW's more general interpretation, codified at 45 C.F.R. §5.

gloss which the learned decisions of this Circuit have been required to place on the legislation.

The initial question for consideration is whether the "pink sheets," site visit reports and grant applications are documents coming within the disclosure provisions of §552-(a). Under the decisions in this Circuit, it is clear that the NIMH initial review groups constitute "agencies" as that term is used in the Act. *See, e.g., Grumman Aircraft Engineering Corp. v. Renegotiation Bd.*, No. 71-1730 (D.C. Cir. July 3, 1973) ("Grumman II"). They "serve as a discrete, decision-producing layer" in the application process and the priorities they set receive only perfunctory review by the National Advisory Mental Health Council. *Id.* at 10. It is equally clear – indeed not contested – that the "pink sheets" represent the final opinions of the initial review groups, presenting authoritative reasons for assigning each application to a particular priority. The site visit reports must be viewed as integral parts of these final decisions, since, as indicated by the sample file, they are incorporated by reference into the "pink sheets" and are cited as a basis for the review groups' final decisions. *See Sterling Drug, Inc. v. F.T.C.*, 450 F.2d 698, 704-08 (D.C. Cir. 1971); *American Mail Lines, Ltd. v. Gulick*, 411 F.2d 696, 703 (D.C. Cir. 1968). Both types of documents are therefore subject to disclosure as an agency's "final opinions . . . made in the adjudication of cases . . ." 5 U.S.C. §552(a)-(2)(A). As for the grant applications, they are "identifiable records" of an agency and are therefore subject to disclosure upon specific request, which plaintiff has duly made. *See* 5 U.S.C. §552(a)(3); *Bristol-Myers Co. v. F.T.C.*, 284 F. Supp. 745, 747 (D.D.C. 1968).

All of the documents sought by plaintiff must therefore be produced in full unless the Government can establish

that certain papers or sections thereof fall within the specific exemptions enumerated in the Act. Defendants suggest that three of these exceptions are applicable to the documents at issue. In considering this claim, the Court must construe the requirement of disclosure broadly and the exemptions narrowly in order to promote "the clear legislative intent to assure public access to all government records whose disclosure would not significantly harm specific governmental interests." *Soucie v. David,* 448 F.2d 1067, 1080 (D.C. Cir. 1971).

Defendants argue that all description of an applicant's proposed research, whether in its application or in agency reports, constitutes confidential material within the terms of the fourth exemption.[3] However, that exemption shields only trade secrets and other confidential information that is either "commercial" or "financial" in nature. *Getman v. N.L.R.B.,* 450 F.2d 670, 673 (D.C. Cir. 1971). None of the applicants for NIMH grant funds are profit-making enterprises, nor are such funds sought for the production or marketing of a product or service.[4] Whatever Congress

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[3] 5 U.S.C. §552(b)(4): "This section does not apply to matters that are . . . trade secrets and commercial or financial information obtained from a person and privileged or confidential. . . ."

[4] In recent testimony before Congress, Dr. John F. Sherman, Deputy Director of the National Institutes of Health, argued that the fourth exemption should apply to grant documents because "to the scientist and to the research clinician, research designs and protocols are regarded and treated as proprietary information, just as trade secrets are protected by the commercial and industrial sector." Hearings on U.S. Government Information Policies and Practices Before a Subcomm. of the House Comm. on Government Operations, 92d Cong., 2d Sess. 3620 (1972). However, this analysis is only relevant to the extent that Dr. Sherman recognizes that research procedures are not actually trade secrets, nor are researchers part of the

(continued)

may have meant by the admittedly imprecise terms in the fourth exemption, the Court cannot, consistent with its duty to construe the Act's exemptions narrowly, find that scientific research procedures to be undertaken by non-profit educational or medical institutions fall within those terms.[5] Even if the Court were to find otherwise, however, defendants would not prevail, for they have wholly failed to meet their burden of proving that the particular research designs and protocols at issue in this case contain material that would normally be kept confidential by the researchers themselves, regardless of the agency's own assurances of confidentiality. *See Sterling Drug, Inc. v. F.T.C., supra,* at 709.

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[4] (continued) "commercial or industrial sector." His argument for exemption by analogy cannot be adopted in light of the requirement that exemptions be interpreted narrowly.

[5] The Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act (1967), at 34, apparently reached a contrary conclusion, based upon comments in the congressional reports to the effect that "technical data" concerning "scientific or manufacturing processes" would be covered by the fourth exemption. However, Professor Davis points out that the quoted language was derived from a Senate report on an earlier version of the exemption which did not contain the limiting words "commercial or financial," and that the shielding of non-commercial technical information would be contrary to the clear wording of the statute. *K. Davis, The Information Act: A Preliminary Analysis,* 34 *U. Chi. L. Rev.* 761, 789-91 (1967). In resolving this dispute in Davis' favor, the Court finds it significant that the D.C. Circuit in *Getman* followed Davis and interpreted the fourth exemption narrowly (although it did not specifically consider the disputed language in the congressional reports), while the Attorney General's Memorandum interpreted it broadly to cover all confidential material.

Defendants also raise the fifth exemption,[6] which shields inter- and intra-agency memoranda. However, this Court's finding that the "pink sheets" and site visit reports constitute final agency opinions takes those documents out of the fifth exemption, *see Grumman II, supra,* at 13, and the applications are not protected because they were written by non-agency personnel, *see Note, The Freedom of Information Act and the Exemption for Intra-Agency Memoranda,* 86 Harv. L. Rev. 1047, 1063-66 (1973), and *contain* essentially factual material, *see Bristol-Myers Company v. F.T.C.,* 424 F.2d 935, 939, *cert. denied,* 400 U.S. 824 (1970).

Similarly, there is no merit to defendants' claim that the disclosure of any agency reference to the professional qualifications or competence of a particular researcher would constitute a clearly unwarranted invasion of personal privacy under the sixth exemption.[7] That provision shields only "personnel and medical files and similar files" from disclosure. Although the term "files" has been justifiably criticized as vague, *see K. Davis, supra* note 4, at 798, it cannot be ignored.[8] The sixth exemption was intended to protect "detailed Government records on an

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[6] 5 U.S.C. §552(b)(5): "This section does not apply to matters that are . . . inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency. . . ."

[7] 5 U.S.C. §552(b)(6): "This section does not apply to matters that are . . . personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy . . . ."

[8] An earlier version of the sixth exemption shielded the specified files and all "similar *matter*" (emphasis added), but Congress amended that phrase to use the more limited term "files" throughout. *K. Davis, supra* note 4, at 798 n. 94.

individual," H. Rep. 1497, 89th Cong., 2d Sess. 11 (1966), and it cannot be extended to shield a brief analysis of professional competence written into a final agency opinion.

Perhaps in recognition of this distinction, Congress incorporated another privacy provision into the Act which is not limited to Government files. Immediately following the disclosure requirement in §552(a)(2), the Act states: "To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction. However, in each case the justification for the deletion shall be explained fully in writing." Portions of the "pink sheets" and the site visit reports could fall within the terms of this exemption, but the Government has the burden of establishing that disclosure in each instance would be "clearly unwarranted." *See Getman v. N.L.R.B., supra,* at 674.

Upon careful consideration of the competing interests involved, the Court concludes that the Government may, to the extent described below, delete identifying details from statements of opinion concerning the professional qualifications or competence of particular individuals involved in the research project under consideration. Disclosure of such information might substantially injure the professional reputations of researchers, while deletion would not, in most instances, significantly obscure the reasons for assigning an application to a particular priority.

It must be stressed, however, that the holding of this Court is narrowly limited. Normally, only the names of the individuals under discussion may be deleted, leaving the opinions themselves free to be disclosed. *Grumman Aircraft Engineering Corp. v. Renegotiation Bd.*, 425 F.2d 578, 580-81 (D.C. Cir. 1970) ("Grumman I"). If, as is

the case with many of the documents sought by plaintiff, the names of the researchers have already been disclosed or if for any other reason the deletion of such names would not conceal the identity of the individuals under discussion, the statements of opinion might have to be deleted in their entirety. But in every case the defendants may only delete that minimum amount of information necessary to conceal the identity of those individuals whose privacy is threatened in the manner described above.

As a further limitation, no deletions whatever may be made from documents relating to an application – whether initial, continuation, renewal or supplemental – which has actually been granted, since in such cases the public's interest in knowing how its funds are disbursed surpasses the privacy interests involved. Nor may the identity of an institutional applicant be concealed, because the right of privacy envisioned in the Act is personal and cannot be claimed by a corporation or association. *K. Davis, supra* note 4, at 781, 799.

Apart from resolution of the instant controversy, plaintiff asks for assistance to insure that subsequent similar requests for information from NIMH will not be delayed and obfuscated by drawn-out negotiations and Court proceedings. Plaintiff's concern is well taken, for the Act should, to the extent practical, be self-operative to assure prompt disclosure as contemplated by Congress. At a minimum, the defendants should promptly modify existing regulations and grant application instructions to bring them into conformity with the decision of this Court. It is particularly important that grant applicants be placed on notice that information submitted pursuant to an application for NIMH grant funds and final agency opinions concerning the award of such funds, as defined above,

cannot normally be kept confidential nor withheld from the public.

The foregoing shall constitute the Court's findings of fact and conclusions of law.

/s/ GERHARD A. GESELL

United States District Judge

November 6, 1973.

APPENDIX C

FREEDOM OF INFORMATION ACT, 5 U.S.C. §552:

§552. Public Information; agency rules, opinions, orders, records, and proceedings.

(a) Each agency shall make available to the public information as follows:

* * * * *

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying –

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

* * * * *

(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, on request for indentifiable records made in accordance with published rules stating the time, place, fees to the extent authorized by statute, and procedure to be followed, shall make the records promptly available to any person . . . .

* * * * *

(b) This section does not apply to matters that are – . . . .

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency; . . . .

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-736

WASHINGTON RESEARCH PROJECT, INC., PETITIONER

v.

DEPARTMENT OF HEALTH, EDUCATION AND WELFARE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Plaintiff contends that the court of appeals erred in holding exempt from compulsory public disclosure, under the Freedom of Information Act, evaluations of proposed research projects prepared by an initial review group for the use of the National Advisory Mental Health Council in advising the National Institute of Mental Health about proposed grants for such projects.

Plaintiff sued to compel disclosure of applications for proposed research grants and of certain documents prepared in the course of NIMH's evaluation of such applications. The district court granted relief as to all

documents (Pet. App. B1-B16; 366 F. Supp. 929) and the court of appeals affirmed as to the applications[1] but reversed as to the evaluative reports (Pet. App. A18-A24; 504 F.2d 238).

The Public Health Service Act authorizes the Secretary of Health, Education and Welfare to make grants for the development of improved methods of diagnosing and treating mental illness,[2] upon the recommendation of the National Advisory Mental Health Council ("NAMHC"), an advisory body composed of medical and scientific authorities in fields related to mental health; outstanding citizens with special interest in mental health matters; and government officials on an *ex officio* basis. 42 U.S.C. 218(a), 242a(a)(2) and 242a(h). As the Secretary's delegate, a unit of the Public Health Service, the National Institute of Mental Health ("NIMH") (see 38 Fed. Reg. 27316; 39 Fed. Reg. 1654, 1657-1658), has established a system for the initial review of grant applications by *ad hoc* or standing review groups ("IRGs") composed

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[1]We believe that both courts erred in holding that the applications were not covered by the exemption for "trade secrets and commercial or financial information" (5 U.S.C. 552(b)(4)), but have not sought review because the court of appeals' ruling was limited to applications resulting in grants and the record in this case insufficiently established the need for confidentiality of such applications (Pet. App. A8-A10).

[2]The Act originally authorized the Surgeon General to make such grants, but this authority was vested in the Secretary by Reorganization Plan No. 3 of 1966, 80 Stat. 1610.

of consultants expert in various specialties of mental health research (Pet. App. A12), assisted by an NIMH employee who serves as Executive Secretary.[3]

The IRGs meet periodically to consider applications, including the scientific merit of the project, the researchers' qualifications, the proposed budget and the period of support requested. After discussing each application, the IRG members vote on their recommendation to NAMHC —*i.e.*, approval, disapproval, or deferral of the application—and they assign priority ratings based on scientific merit in cases of recommended approval. IRG actions are not disclosed to the applicants or to the general public (*id.* at A15).

Following an IRG meeting, the Executive Secretary prepares a summary ("pink sheet") for each application reviewed, including a summary of the considerations that led to the recommendation, an opinion as to the professional qualifications and competence of the researchers, discussion of the proposed budget and resources to be used, a summary of any report on a visit to the applicants' facilities, and the minority views of IRG members. The Executive Secretary may add a "Note" to clarify any matter not resolved by the IRG, to incorporate information obtained subsequent to the IRG meeting, or to direct attention to relevant factors other than scientific merit (*id.* at A5).

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[3]Each grant application is referred to the Executive Secretary of the pertinent IRG. The Executive Secretary refers the application to IRG members who prepare an evaluation of each application and, if necessary, a "site visit" report concerning any visit to the applicant's research facilities (*id.* at A4). The court of appeals held that such site visit reports are not subject to compulsory disclosure, a ruling not challenged in the petition.

NAMHC reviews the applications and pink sheets and determines its own recommendation to NIMH, based upon such factors as program priority and general policy. After consideration of NAMHC's recommendation and such additional factors and availibility of funds, NIMH then determines whether to award a grant (*id.* at A6).

2. Petitioner's contention that the summary of the IRG meeting is the "opinion" of NIMH itself concerning the grants it makes (Pet. 8-12), was properly rejected in the comprehensive opinion of the court of appeals, on which we rely (Pet. App. A15-A17).

In holding that the IRG's were part of NIMH, not separate agencies, and that the courts should not inquire into the extent of NIMH's review to see if the IRG reports constituted the actual decision of the agency, the court of appeals stated (*id.* at A15-A17):

> * * * IRGs do confine themselves to making recommendations, authority to make grants is vested in the Secretary, and authority to recommend doing so lies with the NAMHC. The IRGs act as consultants to the NAMHC; their members are strictly forbidden from communicating their group's recommendations to applicants. NIMH Handbook, *supra* note 2, at 30. Applicable regulations and administrative rules within NIMH and HEW have consistently reflected the view that the IRGs are not subject to the FOIA, *see id.;* 45 C.F.R. §§ 5.72(b), 5.73(a); and the authority under which they are appointed gives no hint of a congressional expectation that NAMHC's delegation of the initial review function would somehow make either more or less information available to the legislature or the public.

* * * Employing consultants to improve the quality of the work that is done cannot elevate the consultants to the status of the agency for which they work unless they become the functional equivalent of the agency, making its decisions for it. There is no doubt in this instance that the usually perfunctory review the NAMHC gives to a particular application— as opposed to the group of which it is a part—makes the IRGs' recommendations an often crucial element in the approval process. But, just as the APA makes the fact that a government authority's decisions are subject to review irrelevant in determining whether that authority is an agency, at least in this case the degree of scrutiny its decisions are given on review is equally beside the point.

The important consideration is whether it has any authority in law to make decisions. The IRGs have not; their favor is not necessary because the law empowers the Secretary to make grant awards if (and only if) the NAMHC so recommends. The fact that the NAMHC may be greatly influenced by the IRG's expert view does not make the IRG an agency. See *International Paper Co.* v. *FPC*, 438 F. 2d 1349, 1359 (2d Cir. 1971). * * * [I]n *Grumman II* we looked to the functions that * * * the Regional Boards * * * were empowered by law to perform. The alternative would inevitably involve the courts in determining the care with which the decisional officers of government agencies supervise their staffs, in order to determine whether in fact the staff is not the stand-in for the officer or agency—its recommendations his decisions—and whether it ought not therefore in law to be held accountable as the agency. This we cannot do. *Morgan* v. *United States*, 304 U.S. 1, 18 (1938); *United States* v. *Morgan*, 313 U.S. 409, 422 (1941).

That is not to say that a staff recommendation may never achieve the dignity of an agency's final decision; it may do so when the agency adopts it as its own, and at that point its disclosure can be required. * * * In the present case, however, leaving aside the problem of whether even the denial of a grant award is "affirmative action" against an applicant, the reasoning of the IRG is not the "only basis" for the Secretary's decision. The Executive Secretary's Note and the NAMHC's policy choices, and in some instances the latter's particularized scrutiny, intervene. * * *[4]

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[4]The court of appeals distinguished its prior decisons in *Soucie* v. *David*, 448 F.2d 1067 (C.A.D.C.), and *Grumman Engineering Corp.* v. *Renegotiation Board*, 482 F.2d 710 (C.A.D.C.), No. 73-1316, argued January 14, 1975, on the ground that, unlike the agencies there involved (the Office of Science and Technology and the Regional Boards of the Renegotiation Board), "the IRGs do confine themselves to making recommendations" (Pet. App. A15). On writ of certiorari in *Grumman* the Renegotiation Board has argued that the court of appeals incorrectly decided that case because, *inter alia*, "the Board simply approves or disapproves the * * * [Regional Board's recommendation]. It does not adopt any of the memoranda that are before it" (Appendix, No. 73-1316, p. 79). Petitioner here, adopting the government's view of the evidence in *Grumman*, states that "it is arguable that the full Renegotiation Board exercises true independent review over the divisional and regional recommendations * * *" (Pet. 11). Petitioner therefore concludes that this case, and only this case, presents the "basic principle * * * whether [only] agencies which *in fact* adopt staff recommendations as their own must disclose those recommendations to the public" (Pet. 11-12). However, that issue is, if anything, less squarely presented here than in *Grumman* because here even the lower court found that the NIMH does not "in fact adopt" IRG recommendations as its "own" in any relevant sense.

3. Petitioner's alternative contention (Pet. 12) that the court of appeals' decision "misinterprets" this Court's decision in *Environmental Protection Agency* v. *Mink*, 410 U.S. 73, in holding that the pink sheets are exempt from disclosure as "inter-agency or intra-agency memorandums" (5 U.S.C. 552(b)(5)), rests upon the unfounded premise that the contents of the pink sheets are "factual" in any meaningful sense. After examining and describing representative samples, the court of appeals concluded, however, in an opinion on which we rely (Pet. App. A20-A22):

> [I]t is clear that most of the matters called for in the site visit report and Summary Statement for each application are evaluative, and call into play the policy of protecting the deliberative process, at which Exemption 5 is directed. *See EPA* v. *Mink, supra* * * *. Indeed, the only matters that are even arguably subject to compelled disclosure are the Summary Statements' (2) description of the proposal, its aims and methodology, and any factual matter contained in (9) the summary of the site visit report. In the site visit report itself, only (11) the statement of facilities, and (12) the budget, merit comment.
>
> Of these four items, the two (2 and 9) in the Summary Statement are abstracts of other information—either the site visit or portions of the underlying application. As such we think them covered by the reasoning of [*Montrose Chemical Co.* v. *Train*, 491 F.2d 63 (C.A. D.C.)] * * *. That case involved application of Exemption 5 to summaries, made by agency staff attorneys, of evidence developed at a public hearing. The summaries were prepared for and submitted to the Administrator of the Environmental

Protection Agency "to assist [him] in his study of the record" on the basis of which he was obliged to make a decision. This court held the summaries exempt as an integral part of the deliberative process. Sensitive to the necessity of attaching varying degrees of significance to different facts in the course of epitomizing the record, we said:

> Even if they cited portions of the evidence verbatim, the assistants were making an evaluation of the relative significance of the facts recited in the record; separating the pertinent from the important is a judgmental process, sometimes of the highest order; no one can make a selection of evidence without exercising some kind of judgment, unless he is simply making a random selection. 491 F. 2d at 68.

No significant difference distinguishes the present case from *Montrose Chemical.* The research design and description of methodology in the application submitted for *in camera* inspection covers fifteen, single-spaced typewritten pages; their description in the Summary Statement is one page in length. In the *Montrose Chemical* paradigm, the judgmental element arises through the necessity to select and emphasize certain facts at the expense of others. In the instant case, where the whole proposal must be described at least in general, various aspects of it are described in greater detail than others. In virtually every sentence

> the author must operate at a level of specificity that reflects his personal perspective on the material being summarized. [Footnotes omitted.][5]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MARCH 1975.

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[5]Petitioner contends (Pet. 13-15) that, regardless of whether the contents of a document are factual or deliberative, once considered by a agency in making a decision they become "facts" beyond the protection of Exemption 5. This contention is untenable, for it would render meaningless the distinction between "fact" and opinion and would undermine the deliberative process that Exemption 5 was designed to protect. See *Environmental Protection Agency* v. *Mink, supra.*